Supreme Court, U.S.
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No. 96-846

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CEMEX, S.A.,
Petitioner,
v.
UNITED STATES OF AMERICA, and
THE AD HOC COMMITTEE OF AZ-NM-TX-FL
PRODUCERS OF GRAY PORTLAND CEMENT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION FOR THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT

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QUESTION PRESENTED

Whether, under the circumstances of this case, the court below correctly held that the Court of International Trade ("CIT") did not abuse its discretion in finding that Petitioner waived its right to appeal a methodology used by the International Trade Administration of the U.S. Department of Commerce ("Commerce") in an antidumping administrative review by failing to make a timely objection where (1) Petitioner's failure to object was not excused by any subsequent judicial decision changing the law applicable to Commerce's methodology in a manner favorable to Petitioner; (2) the law concerning Commerce's methodology was unsettled at the time of Petitioner's failure to object; and (3) Commerce's methodology was in dispute before the CIT.

PARTIES TO THE PROCEEDING

Respondent, The Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement ("Ad Hoc Committee"), makes the following statement pursuant to Rule 29.6 of this Court. The Ad Hoc Committee is an informal association composed of U.S. producers of gray portland cement and cement clinker. The members of the Ad Hoc Committee and their parent companies and non-wholly owned subsidiaries, if any, are listed below:

Florida Crushed Stone Company

Holnam, Inc. (subsidiary of Holderbank Financiere Glaris Ltd.)

North Texas Cement Company (joint venture of Ash Grove Cement Company and P.C. Investments Inc.)

Phoenix Cement Company

Riverside Cement Company (subsidiary of Ssangyong Cement Industrial Company, Ltd.)

Southdown, Inc.

Texas Industries, Inc.

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BRIEF IN OPPOSITION FOR THE AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT

STATEMENT

1. Commerce issued an antidumping order on imports of gray portland cement and clinker from Mexico on August 30, 1990. *Gray Portland Cement And Clinker From Mexico,* 55 Fed. Reg. 35,443 (1990). The antidumping order was based on Commerce's determination that gray portland cement and clinker from Mexico were sold in the United States at less than fair value and a determination by the U.S. International Trade Commission that U.S. cement producers located in the southern tier states were materially injured by reason of dumped imports from Mexico. *Gray Portland Cement And Clinker*

From Mexico, 55 Fed. Reg. 29,244 (1990); *Gray Portland Cement And Cement Clinker From Mexico*, 55 Fed. Reg. 35,371 (1990).

As a result of the antidumping order, importers were required to post cash deposits of estimated antidumping duties on future entries of gray portland cement and clinker from Mexico. The rate of estimated duties was determined by the dumping margin found by Commerce in its final determination in the antidumping investigation.

Under 19 U.S.C. § 1675, at the request of any party, Commerce must conduct an annual administrative review of the antidumping order. The purpose of such a review is to determine the actual antidumping duties owed by importers for entries of merchandise covered by the order during the review period. Pet. App. 97a-100a. Importers are assessed antidumping duties at the rate determined by Commerce in the review, which also establishes the new cash deposit rate for future entries covered by the order. If no party requests a review, the duties are assessed at the cash deposit rate determined in the original investigation or the most recent administrative review.

2. On April 28, 1993, Commerce issued the final results of the first administrative review of the antidumping order on gray portland cement from Mexico—the review at issue in this case. That review covered imports during April 12, 1990-July 31, 1991. *Gray Portland Cement And Clinker From Mexico*, 58 Fed. Reg. 25,803 (1993) (Pet. App. 39a-67a). Under the antidumping law in effect at the time of Commerce's final results,[1] Commerce determined the dumping margin

[1] The antidumping law was revised in 1994 by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465. Although the process by which Commerce conducts antidumping investigations and administrative reviews and determines dumping margins remains essentially unchanged, the 1994 amendments changed some of the statutory terminology and altered certain methodologies,

by comparing the foreign market value ("FMV") of the merchandise in question to its U.S. price. FMV and U.S. price were determined by making various adjustments, set out in the statute, to the gross selling prices to customers in the foreign market and in the United States. 19 U.S.C. §§ 1677a & 1677b (reprinted in the appendix to this brief at 6a-18a).

Among the adjustments set forth in the statute was a requirement that Commerce increase the U.S. price by "the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States." 19 U.S.C. § 1677a(d)(1)(C) (reprinted in the appendix to this brief at 7a).[2] Therefore, the statute required Commerce to adjust the U.S. price, not FMV, to account for direct taxes (such as value-added taxes) that were imposed on merchandise sold in the exporting country but that were forgiven on merchandise exported to the United States. Nevertheless, prior to the CIT's 1986 decision in *Zenith Elec. Corp. v. United States*, 633 F. Supp. 1382 (Ct. Int'l Trade 1986), *appeal dismissed*, 875 F.2d 291 (Fed. Cir. 1989) ("*Zenith I*"), Commerce accounted for such

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including the methodology at issue in this case. Under section 291 of the URAA, however, the amendments apply only to antidumping investigations and administrative reviews initiated after January 1, 1995, and thus do not apply to this case.

[2] Section 224 of the Uruguay Round Agreements Act (reprinted in the appendix to this brief at 19a) amended the antidumping law to require that the adjustment for such taxes be made by reducing the price at which the merchandise is sold in the country of exportation, not by adding to the price at which it is sold in the United States. As discussed in note 1, *supra*, this amendment is effective only for antidumping investigations and administrative reviews initiated after the January 1, 1995 effective date of the URAA and thus does not affect the methodology Commerce used in this case.

taxes by deducting from FMV the amount of tax assessed on merchandise sold in the home market. Commerce did so because of its concern that adding the amount of such taxes to the U.S. price had a "multiplier effect" that artificially increased the dumping margin. *Id.* at 1386 n.9. *Zenith I* ruled that Commerce's methodology was contrary to the statute.

As a result of the CIT's decision in *Zenith I*, Commerce changed its methodology for accounting for foreign direct taxes that are forgiven on export sales. Commerce adjusted U.S. price, but also made a "circumstance of sale" deduction to FMV under 19 U.S.C. § 1677b(a)(4)(B) (reprinted in the appendix to this brief at 10a) to offset the "multiplier effect." The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"), however, determined on March 19, 1993, that this methodology was contrary to the statute. *Zenith Elec. Corp. v. United States*, 988 F.2d 1573 (Fed. Cir. 1993) ("*Zenith II*").

Slightly more than a month thereafter, on April 28, 1993, Commerce issued the final results of the administrative review underlying this case. Commerce acknowledged the Federal Circuit's decision in *Zenith II* and stated that it was using a new methodology (the "*Federal-Mogul* methodology")[3] of "add[ing] to the U.S. price the absolute amount of tax on the comparison merchandise sold in the country of exportation." Pet. App. 64a-65a. Commerce applied this methodology in adjusting for Mexican value-added tax ("VAT") that was imposed on sales of cement in Mexico but not on exports of cement to the United States.

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[3] This methodology is referred to as the *Federal-Mogul* methodology because, as discussed below, it was subsequently upheld by the Federal Circuit in *Federal-Mogul Corp. v. United States*, 63 F.3d 1572 (Fed. Cir. 1995).

3. Both the Ad Hoc Committee and Petitioner, CEMEX, S.A., appealed Commerce's final results to the CIT. The Ad Hoc Committee challenged Commerce's use of the *Federal-Mogul* methodology, contending that it was inconsistent with the statute. Before the issue was briefed to the CIT in this case, another CIT judge acting in a different case ruled that the *Federal-Mogul* methodology was contrary to the statute. *Federal-Mogul Corp. v. United States*, 834 F. Supp. 1391 (Ct. Int'l Trade 1993) ("*Federal-Mogul I*"), *rev'd*, 63 F.3d 1572 (Fed. Cir. 1995).

In response to the CIT's ruling in *Federal-Mogul I*, Commerce developed a fourth methodology (the "*Torrington* methodology")[4] for adjusting for foreign direct taxes forgiven on export sales. Under the *Torrington* methodology, Commerce (1) multiplied the price of the mechandise sold in the United States by the tax rate applicable to merchandise sold in the home market and added the result to the U.S. price and (2) made further adjustments to both the U.S. price and the home market price to prevent the tax adjustment from creating dumping margins that would not exist if no tax were imposed on home market sales.

Before the CIT, defendant, the United States, submitted a brief on April 18, 1994, acknowledging the decision in *Federal-Mogul I* and requesting the CIT to "remand the case so that Commerce may make the VAT adjustment consistent with its new practice," *i.e.*, the *Torrington* methodology (the relevant portion of the Government's CIT brief is reproduced in the appendix to this brief at 1a). To eliminate any possible misunderstanding as to which methodology it was proposing that Commerce use on remand, the Government cited Commerce's deter-

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[4] This methodology is referred to as the *Torrington* methodology because, as discussed below, it was subsequently upheld by the CIT in *Torrington Co. v. United States*, 853 F. Supp. 446 (Ct. Int'l Trade 1994).

mination in *Certain Stainless Steel Wire Rods From France*, 58 Fed. Reg. 68,865, 68,866 (1993), applying the *Torrington* methodology. In a brief filed the same day (the relevant portion of which is reproduced in the appendix to this brief at 2a), Petitioner also argued that the CIT should remand to Commerce in light of the CIT's decision in *Federal-Mogul I*.

On May 24, 1994, prior to oral argument before the CIT in this case, the same CIT judge who decided *Federal-Mogul I* upheld the new *Torrington* methodology. *Torrington Co. v. United States*, 853 F. Supp. 446 (Ct. Int'l Trade 1994). That methodology was subsequently upheld by the CIT in numerous other cases.[5]

The CIT held oral argument in this case on August 10, 1994. As of that date, nearly four months had passed since the Government had requested the CIT to remand the case to permit Commerce to apply its new *Torrington* methodology. Two and a half months had passed since the CIT upheld that methodology in the *Torrington* decision. Neither at the oral argument nor in any written submission to the CIT prior to oral argument did Petitioner object to the remand requested by the Government.[6]

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[5] *See, e.g., Independent Radionic Workers of America v. United States*, 862 F. Supp. 422 (Ct. Int'l Trade 1994); *Zenith Elec. Corp. v. United States*, 18 Ct. Int'l Trade 882 (1994); *Zenith Elec. Corp. v. United States*, 18 Ct. Int'l Trade 870 (1994); *Samsung Elec. Co. v. United States*, 18 Ct. Int'l Trade 891 (1994).

[6] Before the Federal Circuit, Petitioner complained that the CIT judge, in expressing her intent to remand the VAT issue during oral argument, did not specifically refer to the *Torrington* methodology. Pet. App. 4a. Given the clear reference in the Government's brief to Commerce's use of that methodology in another antidumping case and the fact that the CIT had recently approved that methodology, however, Petitioner had no basis for misunderstanding which methodology Commerce was to use on remand. *Id.* As the CIT noted, Pet. App. 16a n.7, all parties "apparently understood" what the court meant when it referred at oral argument to

In its decision of September 26, 1994, the CIT stated:

> Commerce concedes that in *Federal-Mogul Corp. v. United States,* 834 F. Supp. 1391, 1396 (Ct. Int'l Trade 1993), the court rejected the manner in which Commerce had been interpreting *Zenith Elecs. Corp. v. United States,* 988 F.2d 1573, 1582 n.4 (Fed. Cir. 1993), when making a VAT adjustment. Commerce thus agrees that the court should remand this case for VAT adjustment, as does CEMEX. The court further instructs Commerce that it shall apply its new VAT methodology as approved in *Torrington Co. v. United States,* 853 F. Supp. 446, 448-49 (Ct. Int'l Trade 1994).

Pet. App. 29a.

On October 19, 1994, in its first submission to Commerce following the CIT's remand order (the relevant portion of which is reproduced in the appendix to this brief at 4a), Petitioner noted the CIT's instruction that Commerce "apply its new VAT methodology as approved in *Torrington Co. v. United States*, 18 CIT ——, 853 F. Supp. 446, 448-49 (1994)" and argued that Commerce "should therefore apply its new methodology in accordance with the Court's instructions." Thus, not only was Petitioner under no misapprehension as to the methology Commerce was to use on remand, but it affirmatively urged Commerce to use that methodology. Only on December 5, 1994—nearly eight months after the Government's request for a remand to apply the *Torrington* methodology and over two months after the CIT's remand order—did Petitioner first raise an objection to that methodology. On that date, Petitioner submitted com-

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the VAT methodology approved in the "Avesta cases and the cases decided by the judge in *Torrington*." The *Torrington* methodology was also affirmed by the CIT in *Avesta Sheffield, Inc. v. United States,* 18 Ct. Int'l Trade 246 (1994). In any event, Petitioner concedes before this Court that it failed to timely object to the CIT's remand to Commerce to apply the *Torrington* methodology. *See* Pet. 4.

ments on Commerce's draft redetermination on remand objecting to certain aspects of the *Torrington* methodology. As conceded in its petition to this Court, Petitioner "did not initially object to the CIT's order that the *Torrington* methodology be used," and it only "subsequently argued to Commerce and to the CIT that modifications were necessary to the *Torrington* methodolgy [sic]." Pet. 4.

As required by the CIT's order, Commerce's September 26, 1994 final determination on remand applied the *Torrington* methodology and rejected Petitioner's newfound objections to that methodology. Pet. App. 71a-72a and 80a-83a. On May 15, 1995, the CIT affirmed Commerce's application of the *Torrington* methodology on remand, but remanded again to Commerce on other grounds. The CIT rejected Petitioner's belated objections to the *Torrington* methodology:

> CEMEX contests the secondary adjustments in the new VAT methodology where Commerce "adjust[s] . . . the foreign market tax and the USP tax adjustment" to account for expenses deducted in calculating FMV and USP. . . . CEMEX's challenges, however, to Commerce's application of its new VAT methodology were not raised until the remand proceedings in this case. CEMEX also never raised objection to the court's direction for Commerce to apply, on remand, the *Torrington*-approved VAT methodology. On the contrary, in a submission to Commerce on remand, CEMEX made an affirmative statement of support for the *Torrington*-approved methodology. *See* Admin. Pub. Doc. 2, at 6 ("[Commerce] should . . . apply its new [*Torrington*-approved VAT] methodology in accordance with the Court's instructions.") Thus, the court will not here consider for the first time general challenges to that methodology.
>
> As to the specific application of *Torrington* to these facts, CEMEX had an obligation, before it

> supported *Torrington* or acquiesced in it, to examine application of the new VAT methodology to its product if it wanted to claim an exception from the methodology for this case. CEMEX's attempts to challenge the new VAT methodology now are untimely.

Pet. App. 16a-17a.

Commerce issued its determination pursuant to the CIT's second remand order on June 14, 1995. Pet. App. 89a-90a. The CIT sustained this determination in a decision dated July 12, 1995, which also rejected Petitioner's renewed argument that it did not waive its objection to the *Torrington* methodology:

> Contrary to Cemex's objections all parties were aware that on remand the court was ordering ITA to apply its new methodology, which was approved in *Torrington Co. v. United States*, 853 F. Supp. 446, 448-49 (1994). As previously indicated, Cemex also affirmatively led ITA to believe it supported that approach. Cemex's new challenge to the ITA's VAT methodology is untimely.

Pet. App. 8a.

4. Petitioner appealed to the Federal Circuit. While that appeal was pending, the Federal Circuit reversed *Federal-Mogul I* and held that the *Federal-Mogul* methodology constituted a reasonable exercise of Commerce's discretion to interpret the statute. *Federal-Mogul Corp. v. United States*, 63 F.3d 1572 (Fed. Cir. 1995) ("*Federal-Mogul II*"). In particular, the Federal Circuit approved Commerce's goal of applying a methodology that was "tax-neutral" and did not distort the dumping margin. *Id.* at 1580. Importantly, in ruling that Commerce's use of the *Federal-Mogul* methodology was permissible under the statute, the Federal Circuit did not find that other methodologies were impermissible. In fact, recognizing that Commerce was no longer using the *Federal-Mogul* methodology, the Federal Circuit required

the CIT on remand to determine whether Commerce "wishe[d] to continue utilizing" the *Federal-Mogul* methodology. *Id.* at 1582. *Federal-Mogul II* did not overrule the CIT's decision in *Torrington* or even address the *Torrington* methodology. Although Commerce chose to resume using the *Federal-Mogul* methodology after it was upheld by the Federal Circuit, that court has never had occasion to rule on whether the *Torrington* methodology is a permissible interpretation of the statute. As discussed above, the CIT has repeatedly held that it is permissible.

5. In this case, the Federal Circuit affirmed the CIT's ruling that Petitioner waived its objection to the *Torrington* methodology. Pet. App. 1a-6a. The Federal Circuit "agree[d] with the government that CEMEX waived its right to object to application of the *Torrington* methodology" and "conclude[d] that CEMEX did not timely object to application of the *Torrington* methodology." Pet. App. 4a. The Federal Circuit reasoned:

> The Court of International Trade correctly found that CEMEX did not properly articulate its objection when it should have. The court found that CEMEX's challenges to the *Torrington* methodology were not raised until the remand proceeding at Commerce, that CEMEX never objected to the court's direction to apply that methodology on remand. The court did not err in its conclusion. Failure of the court to specifically refer to *Torrington* did not excuse CEMEX from raising any objection it may have had because the court had recently approved use of that methodology. [Citation omitted]. CEMEX had reason to expect that Commerce would use it on remand. The court found that CEMEX itself made an affirmative statement accepting application of the *Torrington* methodology. In particular, the court found that CEMEX stated in a submission to Commerce on remand: "[Commerce] should . . . apply its new [*Torrington*-approved VAT] methodology in accordance with the Court's instructions." *Ad Hoc Comm.*, No. 95-91, slip op. at

> 10 (alteration in original). CEMEX has thus failed to show that the court abused its discretion in finding that CEMEX's objections to the *Torrington* methodology were untimely.

Pet. App. 4a.

REASONS FOR DENYING THE PETITION

I. PETITIONER MISSTATES THE FACTS OF THIS CASE

The petition for certiorari is predicated on a contrary-to-fact representation. Petitioner asserts that the Federal Circuit's decision in *Federal-Mogul II* constituted a "controlling" or "binding" precedent, Pet. 6 and 9, that changed the law applicable to Commerce's methodology for adjusting for direct taxes forgiven on export sales. Petitioner further contends that, in light of the new law it claims was announced in *Federal-Mogul II*, the Federal Circuit was obligated to remand to Commerce to apply the *Federal-Mogul* methodology despite Petitioner's admitted failure to timely object to Commerce's use of the *Torrington* methodology. Petitioner, in fact, goes so far as to assert that *Federal-Mogul II* "reversed" the CIT's decision in *Torrington*. *See* Pet. (i) ("By failing to object to a then controlling judicial decision, does a party waive application of a subsequent *reversal* of that decision?") (emphasis added). *See also* Pet. 6 ("At bottom, the CAFC's decision stands for the proposition that a party, by failing to object to a then controlling judicial decision, waives the application of a subsequent *reversal* of that decision.") (emphasis added).

Contrary to Petitioner's representation, the CIT's decision upholding the *Torrington* methodology, which was followed in this and numerous other CIT decisions, was not reversed by the Federal Circuit in *Federal-Mogul II*. In fact, *Torrington* has never been overruled or questioned by any subsequent judicial decision. The only issue decided by the Federal Circuit in *Federal-Mogul II* was

whether Commerce's use of the *Federal-Mogul* methodology constituted a reasonable interpretation of the statute. The *Torrington* methodology was not at issue in *Federal-Mogul II*, and nothing in *Federal-Mogul II* casts doubt upon or discredits the *Torrington* methodology.[7] Commerce's decision to resume using the *Federal-Mogul* methodology after the Federal Circuit's decision solely reflects Commerce's choice to use that methodology, not judicial disapproval of the *Torrington* methodology.[8] Thus, contrary to Petitioner's representation, the current state of the law is that both the *Torrington* methodology and the *Federal-Mogul* methodology have been upheld by the courts as permissible interpretations of the statute.

Accordingly, the petition for certiorari is based on an erroneous premise.[9] There has been no change in the law

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[7] The Federal Circuit's approval of Commerce's goal of making a "tax-neutral" adjustment that does not distort the dumping margin, 63 F.3d at 1580, strongly suggests that the *Torrington* methodology would be permissible under the statute, because it was designed to achieve a tax-neutral result by preventing the creation of a dumping margin that would not exist in the absence of the adjustment. *See* Commerce's September 26, 1994 redetermination on remand, Pet. 71a-72a. As Petitioner conceded in its brief to the Federal Circuit (the relevant portion of which is reproduced in the appendix to this brief at 5a), "*Federal Mogul II* implies that alternative VAT methodologies may also be found lawful."

[8] Petitioner states that, after *Federal-Mogul II*, Commerce "returned to use of the *Federal Mogul* methodology in all subsequent cases" but this case. Pet. 4-5. Contrary to Petitioner's suggestion that it was unfairly singled out for disparate treatment, however, there is no evidence that any party to any other case failed to timely object to Commerce's use of the *Torrington* methodology. Thus, because only Petitioner acquiesced in the *Torrington* methodology, there are no similarly situated parties that were treated differently from Petitioner.

[9] Petitioner also argues that the *Federal-Mogul* methodology used by Commerce in the final results of the administrative review —not the *Torrington* methodology used on remand from the CIT—

applicable to Commerce's use of the *Torrington* methodology. The absence of such a change is fatal to Petitioner's theory why the Court should grant certiorari. Because *Torrington* was not overruled or invalidated—much less "reversed"—by *Federal-Mogul II*, there is no basis for Petitioner's assertion that *Federal-Mogul II* required the court below to excuse Petitioner's admitted failure to timely object to the *Torrington* methodology.[10]

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is "the correct subject of judicial review" in this case. Pet. 6-7. Thus, argues Petitioner, despite the decisions of the CIT and the Federal Circuit upholding Commerce's use of the *Torrington* methodology, the *Federal-Mogul* methodology must be affirmed unless it is contrary to law. This claim is based on a misreading of 19 U.S.C. § 1516a(a)(2)(B)(iii). Although that provision provides a right of review by the CIT of final Commerce determinations in administrative reviews, it does not dictate the subject matter of subsequent appeals to the Federal Circuit or to this Court, which are shaped by the intervening decisions of each court in the chain of review. The Federal Circuit reviews the decision of the CIT, and this Court reviews the decision of the Federal Circuit, not Commerce's final results. *See* 28 U.S.C. § 1295(a)(5); 28 U.S.C. § 1254 (reprinted in the appendix to this brief at 18a). Thus, contrary to Petitioner, the appropriate focus of this Court's review is the decision of the Federal Circuit that the CIT did not abuse its discretion in finding that Petitioner waived its right to appeal the *Torrington* methodology. Petitioner also reasons that it is somehow inappropriate to review Commerce's use of the *Torrington* methodology because it "represents the *CIT*'s views on what methodology should be used"—not Commerce's views. Pet. 7 (emphasis in original). This argument disregards the fact that the *Torrington* methodology was devised by Commerce, not the CIT. More importantly, in the absence of any decision overruling *Torrington*, there is no basis for excusing Petitioner's waiver of its objection to the *Torrington* methodology and no way to resurrect the *Federal-Mogul* methodology at this stage of the case.

[10] Petitioner's insistence that "[s]ince there is neither a Supreme Court nor an *en banc* decision contrary to *Federal-Mogul II*, the CAFC in this instance is bound to adhere to its own prior determination that the *Federal-Mogul* methodology was in accordance with law," Pet. 8, is beside the point. Given Petitioner's admitted failure to timely object to the *Torrington* methodology, the Federal Circuit had no reason to require application of any other methodology in this case.

II. THE DECISION BELOW DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW THAT REQUIRES RESOLUTION BY THIS COURT

Petitioner asserts that the Court should grant certiorari because the issue of waiver raised in this case is an "important federal question." Pet. 6. The law is well established, however, that, "absent exceptional circumstances," a reviewing court does not consider an issue that was not timely raised in the court below. *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977). *See also Air Courier Conf. of America v. American Postal Workers Union*, 498 U.S. 517, 522-23 (1991); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *United States v. Ortiz*, 422 U.S. 891, 898 (1975). The Federal Circuit's decision that the CIT did not abuse its discretion in finding that Petitioner waived its right to appeal Commerce's use of the *Torrington* methodology by failing to make a timely objection is consistent with this longstanding general rule and the Federal Circuit's own precedent. *See, e.g., L.E.A. Dynatech v. Allina*, 49 F.3d 1527, 1531 (Fed. Cir. 1995).

Importantly, as this Court stated in *Singleton*, 428 U.S. at 121, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of the individual case." The Federal Circuit itself correctly reviewed the CIT's decision in this case on an abuse of discretion standard. Pet. App. 4a. The decisions of both courts turned on the particular facts of this case, that is, on Petitioner's failure, despite ample notice and opportunity, to raise its objection to the *Torrington* methodology prior to remand and its affirmative statement to Commerce on remand that Commerce should apply that methodology. Because the decision whether Petitioner waived its objection to the *Torrington* methodology was a matter within the discretion of the courts below based on the facts of this case, the petition for certiorari plainly does not raise an important question of federal law that requires resolution by this Court.

In addition, as discussed in nn. 1 and 2, *supra*, the underlying issue in this case—the methodology used by Commerce in adjusting for foreign value-added taxes and other direct taxes forgiven on export sales—has been mooted for all cases other than this case. Section 224 of the Uruguay Round Agreements Act, Pub. L. No. 103-465, amended the antidumping law to definitively establish the methodology to be used in all investigations and administrative reviews initiated after January 1, 1995. Section 224 amended 19 U.S.C. § 1677b(a)(6)(B)(iii) to provide that the adjustment be made by reducing the price at which the merchandise is sold in the country of exportation, not by adding to the price at which it is sold in the United States. Because the issue of Commerce's methodology raised in this case cannot affect any other case, the petition for certiorari does not raise an important question of law requiring resolution by this court.

III. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS

Petitioner asserts that "the CAFC's decision stands for the proposition that a party, by failing to object to a *then controlling judicial decision*, waives the application of a subsequent reversal of that decision." Pet. 6 (emphasis added). As discussed above, this assertion fundamentally misstates the effect of *Federal-Mogul II*, which did not reverse or even question the validity of the CIT's decision in *Torrington*. It also fundamentally misstates the "controlling" nature of the *Torrington* decision. *Torrington* was issued by a court at the lowest level of judicial review and thus can hardly be characterized as a "controlling" decision. Moreover, at the time Petitioner failed to make its objection, *Torrington* was only the most recent judicial pronouncement on an issue of law that remained profoundly unsettled. By erroneously characterizing the *Torrington* decision, Petitioner seeks to manufacture an inter-circuit conflict that does not exist. Indeed, as dis-

cussed below, the decision below is consistent with the decisions of other federal courts of appeals in similar circumstances.

In arguing that a conflict exists, Petitioner relies on federal appellate court decisions holding that a party may raise an issue for the first time on appeal where a judicial decision issued after the lower court's decision has changed the law. Pet. 12-13. Those cases hold that a party does not have to object to "settled law," *Phillips v. Cameron Tool Corp.*, 950 F.2d 488, 491 (7th Cir. 1991), or to "then settled principles," *United States v. Scott*, 425 F.2d 55, 57-59 (9th Cir. 1970), in order to rely on the change in the law.[11] The reasoning of those cases is that, where the law is settled, it would be unfair to require a party to make an objection, because that would either require the party to be "clairvoyant" about the subsequent change in the law or require it to "state numerous objections to settled law in hopes that something may change while an appeal is pending." *Phillips v. Cameron Tool Corp.*, 950

[11] Oddly, Petitioner cites one case that is arguably contrary to its own argument that it is unnecessary for a party to timely object in the lower court where a subsequent decision changes *settled* law. *See Hegger v. Green*, 646 F.2d 22 (2d Cir. 1981). *Hegger*, however, is readily distinguishable both from the line of cases relied upon by Petitioner and from this case. *Hegger* was a diversity case decided in accordance with New York law. Following trial in the district court, a decision by the New York Court of Appeals resolved an "unsettled" issue of law on which lower state courts had reached differing conclusions. The Second Circuit's decision to apply the new ruling on appeal, however, appears to have been prompted by federalism concerns and the court's conclusion that the New York state courts would have given effect to the decision under those circumstances. *Id.* at 26-27. *See Robinson v. Shapiro*, 646 F.2d 734, 744 (2d Cir. 1981) (citing *Hegger* as ruling that, in a diversity case involving New York law, that circuit is bound to apply the most recent pronouncements of the New York Court of Appeals). Those concerns do not apply in a case—such as this one—based entirely on federal law. In contrast to *Hegger*, later decisions of the Second Circuit applying federal law rely on the futility of objecting to "entrenched precedent" in deciding that a party did not waive an issue where the decisional law later changed. *See Ingber v. Enzor*, 841 F.2d 450, 454-55 (2d Cir. 1988).

F.2d 488, 491 (7th Cir. 1991). Indeed, as clarified by the D.C. Circuit in a case not cited by Petitioner, the "supervening-decision doctrine" *only* applies "where a supervening decision has changed the law in appellant's favor *and the law was so well-settled at the time of trial that any attempt to challenge it would have appeared pointless.*" *United States v. Washington*, 12 F.3d 1128, 1139 (D.C. Cir. 1994), *cert. denied*, —— U.S. ——, 115 S. Ct. 98 (1994) (emphasis added). "[I]t would be unfair . . . . to expect a defendant to object at trial where existing law appears so clear as to foreclose any possibility of success." *Id. See also United States v. Scarpa*, 913 F.2d 993, 1019 (2d Cir. 1990); *Ingber v. Enzor*, 841 F.2d 450, 454-55 (2d Cir. 1988).

The problem with Petitioner's reliance on cases applying the supervening decision doctrine is that this case presents an entirely different set of circumstances. Most notably, there was no change in the law favorable to Petitioner with respect to the *Torrington* methodology at issue in this case. *Federal-Mogul II* did not overrule *Torrington*, and there has been no subsequent decision of any court contrary to the CIT's decision that the *Torrington* methodology is permissible under the statute. The courts have declined to apply the supervening decision doctrine where the subsequent decision did not significantly clarify or change the law favorably to the appellant. *See Washington*, 12 F.3d at 1139; *United States v. Byers*, 740 F.2d 1104, 1133-34 (D.C. Cir. 1984) (concurring opinion).

In addition, at the time Petitioner failed to timely object to the *Torrington* methodology, there was no "settled" law regarding the permissible methodology for adjusting for foreign direct taxes forgiven on export sales. As discussed above, Commerce's methodology changed repeatedly as the result of a series of CIT and Federal Circuit decisions during 1993-1994. On March 19, 1993, the Federal Circuit in *Zenith II* ruled that Commerce's practice of making both an adjustment to U.S. price and

a "circumstance of sale" deduction to FMV under 19 U.S.C. § 1677b(a)(4)(B) was contrary to the statute. Commerce thereafter adopted the *Federal-Mogul* methodology, which was applied in Commerce's April 28, 1993 final results of the administrative review at issue in this case. On October 7, 1993, however, the CIT rejected the *Federal-Mogul* methodology. *Federal-Mogul Corp. v. United States*, 834 F. Supp. 1391 (Ct. Int'l Trade 1993). That decision, in turn, led Commerce to adopt the *Torrington* methodology, which was approved by the CIT on May 24, 1994. *Torrington Co. v. United States*, 853 F. Supp. 446 (Ct. Int'l Trade 1994). Thus, during the 15 months preceding the CIT's August 10, 1994 oral argument in this case, Commerce used three different methodologies in response to decisions by its reviewing courts.

Significantly, although the CIT at that time had approved the *Torrington* methodology and had rejected the *Federal-Mogul* methodology, neither of those methodologies had yet been reviewed by the Federal Circuit. Contrary to Petitioner's contention that the CIT's ruling in *Torrington* constituted a "controlling judicial decision," Pet. 6, that decision obviously did not bind the Federal Circuit. Indeed, the decision of one CIT judge is not even binding upon another CIT judge. *See Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989). Consequently, Petitioner had no basis for assuming that *Torrington* conclusively settled the issue.

Given the uncertainty and rapid change in the law, it was incumbent upon Petitioner, if it believed that the *Torrington* methodology was not a permissible interpretation of the statute, to preserve that issue by making a timely objection. This was not a case, like those cited by Petitioner, in which there was an unexpected change in accepted judicial interpretations of the law. To the contrary, the law was in a state of flux, and it was predictable that a decision from the Federal Circuit regarding either the *Federal-Mogul* methodology or the

Torrington methodology could change the applicable law once again.

In similar circumstances where the applicable law was unsettled, other courts of appeals have held that a party waived its right to appeal by failing to make an objection at the appropriate time. In *Washington*, the D.C. Circuit ruled that criminal defendants waived their objection to a jury instruction that the same court, in another case decided subsequent to trial, held to be constitutionally deficient. 12 F.3d at 1138-39. The court found that "[a]t the time of trial, the constitutionality of the 'strong belief' jury instruction was not so well-established that any objection would have seemed futile." *Id.* at 1139. The court noted that no court had ever held the instruction to be constitutional and that prior decisions had put the defendants "on notice that a plausible objection to a reasonable doubt instruction" might be successful. *Id.* Similarly, the Second Circuit in *Scarpa*, 913 F.2d at 1019, held that the appellant's failure to object to a jury instruction could not be excused despite a judicial decision issued subsequent to trial that changed the law. The court reasoned that there "was no established circuit authority which would have rendered an objection to the challenged . . . instruction futile, thereby excusing a failure to make such an objection." In *Kattan by Thomas v. District of Columbia*, 995 F.2d 274 (D.C. Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 1398 (1994), the D.C. Circuit held that a party waived its right to appeal the district court's award of attorneys fees for legal services provided by one of the plaintiffs acting *pro se* despite the intervening decision of this Court in *Kay v. Ehrler*, 499 U.S. 432 (1991). The court found that the precedent in that circuit on the issue was unsettled and that the defendant could have offered a "legitimate argument" against the fee award even before *Kay v. Ehrler*. *Id.* at 276-77. Given the uncertainty in the law, the defendant had "no reason . . . to assume that this Circuit had conclusively confirmed the availability of a fee award to a *pro se* litigant . . . ." *Id.*

Thus, the decision below is entirely consistent with the decisions of other courts of appeals under similar circumstances. The frequent and recent judicial decisions regarding Commerce's methodology put Petitioner on notice that the law was highly unsettled. Petitioner had no reason to assume that the CIT's *Torrington* decision was conclusive of the issue or that the prevailing law would not change. Under such circumstances, Petitioner was obligated to preserve its objection to the *Torrington* methodology if it intended appealing that issue to the Federal Circuit.

Finally, unlike the cases cited by Petitioner, the issue of Commerce's methodology for accounting for foreign direct taxes forgiven on export sales was actively litigated in this case, so that Petitioner was made aware of the existence of that issue and the need to preserve any objections it had. This was not a case where Petitioner had to be "clairvoyant" in order to raise the issue at the appropriate time. The Ad Hoc Committee's complaint challenged the *Federal-Mogul* methodology used by Commerce in the final results of the administrative review, and briefs filed by all the parties addressed the issue and recognized the necessity for a remand in light of recent court decisions. Thus, Petitioner was fully aware of the importance of the issue and—particularly in light of the nearly four months that elapsed between the Government's request for a remand and oral argument before the CIT—had no excuse for failing to raise its objection. Petitioner had every opportunity to assess the consequences of the *Torrington* methodology and to make the tactical decision whether to acquiesce in Commerce's use of that methodology or to oppose it.

Where the issue sought to be appealed was in dispute in the lower court, other courts of appeals have held that the appellant waived its objection by failing to raise it in a timely manner despite a later change in the law. For example, in *USA Petroleum Co. v. Atlantic Richfield Co.*, 13 F.3d 1276 (9th Cir. 1994), an antitrust case,

the Ninth Circuit held that the appellant waived a theory for recovery despite a later decision of this Court that arguably supported that theory. The court stated:

> The inescapable conclusion . . . is that, although USA recognized below-cost pricing as an independent available theory of predatory pricing under Sherman Act section 1, it made the tactical decision not to rely on that theory but instead chose to advance only its below-market level predation theory. USA thus had a full and fair opportunity to ventilate its views with respect to below-cost pricing; however, USA chose to remove the issue from the case, and thus waived the right to adduce evidence on the matter.

Id. at 1283. "With the issue of the appropriate definition of predatory pricing in dispute, USA was required, should it wish to challenge on appeal ARCO's contention that the section 2 predatory pricing standard applied, to present its contentions concerning the appropriate standard." *Id.* (emphasis added), citing *Singleton v. Wulff.* The Ninth Circuit rejected the appellant's claim that its abandoned theory was revived by the later decision of this Court in *Brook Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). The court acknowledged the principle that a party's failure to raise an issue may be excused by a supervening judicial decision changing the law, but held that principle to be inapplicable where the party "recognized [that the issue] was available but expressly chose not to pursue" it. *Id.* at 1285-86. *See also Kattan,* 995 F.2d at 277 (noting that the defendant had failed to make a timely objection to the requested fee award even though plaintiffs "flagged the issue in a footnote in their application for fees").

Similarly, in this case, Commerce's choice of a methodology for adjusting for foreign direct taxes that are forgiven on export sales was at issue before the CIT, and Petitioner was expressly notified by the Government's brief to the CIT that Commerce would use the *Torrington*

methodology on remand. Thus, Petitioner was aware that it could raise an objection but chose not to do so.

Accordingly, contrary to Petitioner's claim that the decision below is contrary to comparable decisions of other federal appellate courts, there is no such inconsistency. Unlike the cases cited by Petitioner, in this case Petitioner's failure to timely raise an objection cannot be excused because (1) there was no subsequent decision changing the applicable law in a manner favorable to Petitioner; and (2) Petitioner was required to preserve its objection to the *Torrington* methodology because Commerce's methodology for accounting for foreign direct taxes forgiven on export sales was in dispute in this case and the law regarding this issue was not settled, but in flux. In similar circumstances, other federal courts of appeals have held that a party waived its right to appeal. Accordingly, Petitioner has failed to demonstrate any inter-circuit conflict.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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